



United States Department of Agriculture
Food and Nutrition Service

Southeast Region

Reply to
Attn. of: CN-16

October 27, 2004

Subject: SERO Policy NSLP 210.21-21; SFSP 225.17-16; CACFP 226.22-15: Food Service
Management Company Contracts – Renewal and Rebidding

To: All CN Directors
Southeast Region

We have received an inquiry from a food service management company (FSMC) representatives concerning our NSLP memo 210.21-20, dated July 22, 2004, "Reaffirming FNS' Position on Rebates, Discounts, and Other Applicable Credits in Cost Reimbursable Contracts". The FSMC requested confirmation that: "(1) states and SFAs are not required under federal law to include contractual language regarding rebates, discounts, and other applicable credits, (2) but that if they choose to do so, they may include such provisions in their contracts with food service management companies, and (3) if states or SFAs decide to include such provisions in their contracts, it would be lawful as a matter of USDA/FNS regulation and policy for them to do so upon the next RFO cycle, rather than seek to impose such new provisions in mid-cycle contract renewals or through the issuance of an unscheduled new RFP".

We previously addressed (1) and (2) in memoranda, copies attached, dated July 22, 2004, "Reaffirming FNS' Position on Rebates, Discounts, and Other Applicable Credits in Cost Reimbursable Contracts and NSLP memo 210.21-17, dated June 2, 2003, "Applicability of Federal Requirements to School Food Service Procurements". In response to the item (3), we provided the FSMC representative with the following response:

"The National School Lunch Program regulations (7 Code of Federal Regulations Part 210) at 210.16(d) limits the duration of contracts between a SFA and a FSMC to one year, with options for yearly renewals, not to exceed 4 additional years. The option to renew does not create a multi-year contract between the SFA and the FSMC because each renewal results in a separate one-year contract. Since the decision to renew the contract is an affirmative decision that is made by both parties to the contract each year, either party, for any reason, may decide not to exercise the renewal option. An SFA that opts not to renew its FSMC contract must either conduct a new procurement or self-operate its food service.

As long as the SFA has conducted a proper procurement and both parties have met their obligations under the terms of the contract, the renewal option is generally exercised, except where prohibited by applicable law or regulations. Should either party determine

revisions to the contract are needed, non-material changes are generally made when the contract is renewed. Usually, an SFA will incorporate changes resulting from its experience under the current contract and FNS and State agency guidance, recommendations and policy changes in its next invitation for bid/request for proposal. Neither party may make or impose material changes to an existing contract during the contract year or as part of the annual contract renewal process. All material changes require rebidding.

Because of the annual renewal provision is an option and not a guarantee or obligation of either party, FNS cannot require or recommend that an SFA exercise the renewal option in lieu of conducting a new procurement. Likewise there is no requirement to recompile an otherwise legal contract until all renewal options have been exercised.”

Please share this information with your Child Nutrition Programs. If you have any questions, please contact this office at 404-562-7050.

PEGGY FOUTS
Regional Director
Special Nutrition Programs

Attachments

REF: Issued by CND – 10-04-2004 – Food Service Management Contracts – Renewal and
Rebidding



United States Department of Agriculture
Food and Nutrition Service

Southeast Region

Reply to
Attn. of: CN-16

July 22, 2004

Subject: SERO Policy NSLP 210.21-20; SFSP 225.17-15; CACFP 226.22-14: Reaffirming FNS' Position on Rebates, Discounts, and Other Applicable Credits in Cost Reimbursable Contracts

To: All CN Directors
Southeast Region

Our National Office was recently contacted by a representative of a food service management company (FSMC) who expressed concern that some State agencies (SAs) may not be aware of FNS' position on rebates, discounts, and other applicable credits in school food authority (SFA)-FSMC cost reimbursable contracts. Our agency position remains unchanged from our answer to Question 5, in our SERO Policy 210.21-17; 250.15-15 "Applicability of Federal Requirements to School Food Service Procurements ", dated June 2, 2003. Since our position applies to **all** cost reimbursable contracts, not just SFA-FSMC cost reimbursable contracts, we are providing FNS' position to all of our Child Nutrition Program SAs.

In the June 2, 2003 memorandum Question 5 asked: "Does applying Parts 3016 and 3019 to SFA procurements change FNS' position on the crediting of discounts and rebates in cost reimbursable contracts?"

Our agency's answer was and remains: "No. FNS' position on this subject remains unchanged. FNS strongly encourages, but does not require, that all cost reimbursable contracts include provisions to ensure SFAs are only charged net, allowable costs. The Office of Management and Budget and the Department's Office of the General Counsel have made clear that SAs and SFAs can impose compliance with net cost requirements through contractual terms."

If you have any questions, please contact this office.

LANNA R. KIRK
Acting Regional Director
Special Nutrition Programs



United States Department of Agriculture
Food and Nutrition Service

Southeast Region

Reply to

Attn. of: SERO Policy

June 2, 2003

Subject: Policy 210.21-17; 250.15-15 Applicability of Federal Requirements to School Food Service
Procurements

To: All State Directors
National School Lunch Program
Food Distribution Program
Southeast Region

In August 2000, a final regulation published in the Federal Register moved the procurement procedure requirements for the Child Nutrition Programs from Department regulation 7 CFR Part 3015 to 7 CFR Parts 3016 and 3019. Attached are a number of questions and answers we have received concerning how these requirements changed the procurement procedures for public and nonprofit school food authorities (SFAs). This memorandum has been reviewed by the Department's Office of the General Counsel.

Please provide this information to your SFAs and request that it is shared with their legal counsel. In addition, we recommend that you share this information with your chief State legal official.

If you have any questions regarding this matter, please contact this office.

PEGGY FOUTS
Regional Director
Special Nutrition Programs

Attachment

Attachment: Applicability of Federal Requirements to School Food Service
Procurements

Question 1: How did regulations 7 CFR Parts 3016 and 3019 change the procurement procedures for public and nonprofit SFAs?

Answer: The Part 3016 regulation implements the concept of Federalism for public SFAs administering the child nutrition programs. Pursuant to Part 3016.36(b), public SFAs will use their own procurement procedures that reflect applicable State and local laws and regulations, as long as those procedures are consistent with the requirements found at §3016.36(b) through (i) and §3016.60(b) through (c). An SFA may establish any procurement or contract procedure or requirement that is within its authority to establish, so long as the procedures and requirements are consistent with §3016.36(b-i) and §3016.60(b-c).

A nonprofit SFA may elect to follow the procurement procedures at §3019.40-.48 or use its own organizational procedures as long as those procedures are consistent with the requirements of Part 3019.

Question 2: Please explain §3016.36(b-i) and §3016.60(b-c).

Answer: 7 CFR Part 3016.36(b-i) establishes the minimum standards an SFA must follow to conduct a proper procurement. These standards address such elements as the requirement that an SFA have a written code of conduct governing the performance of employees engaged in the award and administration of contracts (§3016.36(b)(3)); methods of procurement (§3016.36(d)); the requirement that the SFA perform a cost or price analysis for every procurement, including contract modifications (§3016.36(f)); and required contract clauses and certifications (§3016.36(i)). For additional information, please consult regulation 7 Part 3016.

The requirement at §3016.60(b), allows an SFA to award a contract to a potential contractor that provided information to the SFA that the SFA used in its drafting of specifications, bid, proposal or contract terms, but prohibits the award of a contract to a potential contractor when the potential contractor actually drafted the specifications, bid, proposal, procurement or contract terms. The SFA alone is responsible for developing the documents used in conducting its procurements. 7 CFR Part 3016.60(c) prohibits the use of in-State and local geographic preferences in the award of contracts.

Question 3: Does regulation 3019 contain the same requirements and prohibitions for nonprofit SFAs?

Answer: The minimum standards (§3019.40-.48) nonprofit SFAs must follow in conducting procurements are generally the same as those that apply to public SFAs. While a nonprofit SFA cannot award a contract using an in-State or local geographic preference, Part 3019 does not contain a corresponding prohibition to §3016.60(c). The specific prohibition is not necessary in Part 3019 because nonprofit SFAs lack the legal standing to establish in-state or local geographic preferences. Nonprofit SFAs have been prohibited from awarding contracts to potential contractors that drafted procurement documents since the mid-1970s. That prohibition is stated at §3019.43.

Question 4: Do the specific procurement and contract clause requirements of the Program regulations still apply?

Answer: Yes. For example, the Part 210.16 requirements regarding the 21-day cycle menu requirement (§210.16(a) (1)), specific clauses at §210.16(c) and duration of contracts (§210.16(d)) still apply to food service management company (FSMC) procurements and contracts.

Question 5: Does applying Parts 3016 and 3019 to SFA procurements change FNS' position on the crediting of discounts and rebates in cost reimbursable contracts?

Answer: No. FNS' position on this subject remains unchanged. FNS strongly encourages, but does not require, that all cost reimbursable contracts include provisions to ensure SFAs are only charged net, allowable costs. The Office of Management and Budget and the Department's Office of the General Counsel have made clear that SAs and SFAs can impose compliance with net cost requirements through contractual terms.

Question 6: Does Federalism prevent the SA from establishing procurement and contract requirements that SFAs must follow?

Answer: No. Consistent with the "flow down" concept of Federalism, a SA may establish procurement and contract requirements that SFAs must follow, as long as those requirements are not inconsistent with Program requirements.

Question 7: Can an SFA follow the procurement procedures at §3016.36(b-i) instead of its own State and local requirements?

Answer: No, an SFA cannot substitute §3016.36(b-i) for more restrictive State or local requirements.

Question 8: Whom should a SA contact to obtain information about the procurement requirements that apply to public SFAs?

Answer: SAs should seek guidance from their State procurement officials and legal counsel or the chief State legal official.

Question 9: If State law exempts public schools from complying with State bid laws, is the SFA exempt from all procurement requirements?

Answer: No. The SFA would still be required to comply with local procurement requirements, any applicable Program requirements and the provisions of §3016.36(b-i) and §3016.60(b-c).

Question 10: Are there any actions a SA must take when it determines its SFAs must follow §3016.36(b-i) because there are no State or local procurement requirements applicable to SFA procurements?

Answer: Yes. In the committee report language accompanying Public Law 105-336, the William F. Goodling Child Nutrition Reauthorization Act of 1998, Congress informed USDA that it “should be prepared to promptly and fully account to the Committees of jurisdiction for each instance in which federal authorities address a matter of a subgrantee procurement.” As a result, FNS is requesting the SA provide written confirmation from the chief State legal official that the State’s public SFAs must follow §3016.36(b-i) because no applicable State or local requirements apply to its public schools.

Question 11: If questions or disputes arise concerning a public SFA’s procurement practices or contracts, do we still contact FNS for guidance?

Answer: No. These issues include contract management and compliance matters such as questions related to source evaluations, protests, disputes and claims. FNS will not substitute its judgment for that of the SA or SFA on these issues unless the matter is primarily a Federal concern. FNS will, however, take the necessary steps to assure compliance with the procurement requirements contained in §3016.36(b-i); §3016.60(b-c); §3019.40-48 and the school nutrition program regulations.

Since disputes may result from the application of State and local laws, regulations and policies, we recommend both SAs and SFAs direct these disputes to appropriate State procurement and legal officials and the SFA’s own local legal counsel. This includes any dispute arising from the SA’s decision requiring SFA compliance with one or more of the procurement procedures contained at §3016.36(b-i) and any decision by a SA or SFA to expand the procurement procedures at §3016.36(b-i).

Question 12: Doesn’t the Federalism concept result in differences between States regarding procurement procedures and contract requirements and even between SFAs within the same State?

Answer: While procedural practices may differ, the fundamental requirements do not. Most public SFAs already operate under requirements that recognize the procurement principles incorporated in Part 3016, such as the requirement for full and open competition and the prohibition against conflicts of interest. To the extent procurement requirements do not exist or are less restrictive than those contained in Part 3016, the common rule requirements continue to apply. In addition, as noted above, all school nutrition program regulations applicable to procurement and contract management, such as the requirement that federally donated commodities accrue only to the benefit of the school food service (7 CFR 210.16(a)(6)) and the Buy American requirement (7 CFR

210.21(d)), continue in effect. With respect to all contracts, including those with FSMCs, SFAs are free to include procurement and contract management requirements in their contract with these companies. FNS strongly encourages SFAs include, in all solicitations and contracts, terms that protect the nutritional and financial integrity of the school nutrition programs. Such terms may include requirements in cost reimbursable contracts that FSMCs, distributors and brokers obtain goods for the programs through competitive procurements and that all discounts, credits and rebates received by these contractors must be credited to the SFA's nonprofit school food service. Further, FNS encourages SAs develop prototype procurement and contract documents as a means of providing technical assistance to SFAs. FNS is currently considering proposing regulations to ensure greater consistency with respect to the participation of FSMCs and other cost reimbursable contractors in the school nutrition programs.

Thus, although the Federalism principles incorporated in Part 3016 do provide greater flexibility and may result in some procedural variations between States and among public SFAs within a State, such as different small purchase thresholds; the basic requirements for sound procurement and contract management remain in place and will continue to be consistently applied. FNS will fully support SAs and public SFAs that exercise sound administrative practices and good business judgment in establishing procurement practices and contract terms that protect the integrity of the school nutrition programs.